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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LORENZO McCLAIN, Plaintiff and Appellant, v. PERSOLVE LLC, Defendant and Respondent.	B281910 (Los Angeles County Super. Ct. No. PC056353)

APPEAL from a judgment of the Superior Court of Los Angeles County. Melvin Sandvig, Judge. Affirmed.

Arias & Lockwood, and Christopher D. Lockwood for Plaintiff and Appellant

Persolve Legal Group, Michael H. Raichelson, Sarah Jane Reynolds and Lloyd Dix for Defendant and Respondent.

Plaintiff Lorenzo McClain asserted claims for malicious prosecution and defamation of credit against Persolve, LLC arising from a lawsuit filed by Persolve to collect an outstanding debt allegedly owed by McClain for dental work. Following the presentation of evidence at trial, the trial court granted Persolve's motion for directed verdict and entered judgment in Persolve's favor. McClain appeals, claiming the evidence was sufficient to support a verdict in his favor.

We disagree. Probable cause supported Persolve's underlying lawsuit against McClain as a matter of law, which defeats his malicious prosecution claim. McClain concedes his common law defamation of credit claim is preempted by federal law, and we find he forfeited his argument that this claim was actually based on a violation of Civil Code section 1785.25, given that he failed to argue that in the trial court. We therefore affirm.

BACKGROUND

This case proceeded to trial on three claims alleged by McClain: malicious prosecution; abuse of process; and defamation of credit.[1] McClain has not pursued the abuse of process claim on appeal, so we focus our discussion on the two claims still at issue. We review the record in McClain's favor, as we are required to do on an appeal from a directed verdict. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 629–630 (*Howard*).)

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[1] Two additional claims of intentional and negligent infliction of emotional distress were dismissed by stipulation.

McClain's lawsuit arose from an earlier case filed on July 12, 2010, by Persolve against McClain to collect a $7,331.17 debt McClain had allegedly incurred. The lawsuit alleged claims for open book account, common counts, and account stated.

The account at issue was assigned to Persolve by GE Money Bank/Care Credit. Persolve's attorney who handled the underlying case testified that she did not recall what documents she had in her possession when Persolve filed the case, but she explained how Persolve generally "obtained the information and went to collect on it." An assignment would come with a "spreadsheet of account information, naming the person, the person's address, their social security, the amount of the debt, the last payment date, the open date." Persolve would also receive documentation from the assignor, which is "where the information was gathered from." Based on that information, an account would be created in Persolve's records.

With regard to the information obtained for the GE Money Bank account, Persolve's attorney testified that, "along with the assignment, there was information provided that an account was opened on a specific date, that there were payments on the account, the amount of payments, and also the last date of the payment." When asked if she had information showing those payments specifically came from McClain, she testified: "The information on hand was that account was opened by somebody by the name of Lorenzo Mr. McClain, there were payments on the account, the last payment date, and the account was charged off with a balance." The trial record does not contain the spreadsheet or other documentation Persolve received as part of the assignment.

McClain testified that, in December 2010, Persolve identified and produced statements for the account. Persolve's discovery responses in March 2011 indicated it had produced "Statements from [GE] Money Bank/Care Credit from June 4, 2004 through July 5, 2009." These statements are not in the trial record. However, Persolve wrote in an April 2013 letter to McClain that they showed "over 35 payments" on the account. McClain did not dispute that these statements reflect this payment history, although he testified that neither his nor anyone else's name was on the statements.

When McClain received these statements, he first learned that the original debt was charged for work done by Dr. B.A. Deirmenjian on May 18, 2004. McClain denied he incurred the debt or that the account was his, and he testified that he knew nothing about it, never received any statements, and never made any payments. He also never received anything from Persolve before it filed the lawsuit against him. He testified he went to Dr. Deirmenjian, a dentist, in December 2002, waited for three hours, then left without being treated. He found another dentist and had been going there ever since.

McClain further testified that Persolve "never provided me with anything showing me that my name was in on any account, making payments" and "[n]obody else's name on the account also." He had dental insurance throughout the period of the alleged debt, and he provided Persolve with proof of that insurance coverage, as well as dental records from his current dentist and bank statements showing he never made a payment on the account.

Subpoenas to Dr. Deirmenjian did not produce any records from the period. McClain also personally went to Dr. Deirmenjian's office but obtained no records.

Per Persolve's standard procedure, Persolve sent McClain an "identity theft" package in February 2011. It included an "ID Theft Statement" and an affidavit developed by the Federal Trade Commission for McClain to complete, along with detailed instructions. At the time, McClain sent a letter to Persolve acknowledging that he received the package but declining to complete it because he did not "have all the facts" and it appeared "the Affidavit and ID Theft Statement are only for your [Persolve's] benefit." He indicated he had provided all the requested information during discovery.

Between October 2012 and March 2013, McClain sent three letters to Persolve pointing out the absence of an application or contract signed by McClain authorizing the debt and requesting dismissal of the case.

A court trial was set for April 22, 2013. In an April 19, 2013, letter to McClain, Persolve stated that it had received "new information" from GE Money Bank showing that "the facts surrounding this account seem strange to say the least." This new information showed $7,000 was charged on the account by Dr. B.A. Deirmenjian on May 18, 2004, and statements were addressed to McClain and mailed to his home address. As noted above, this letter explained that over 35 payments were made on the account between July 2004 and November 2008. Persolve wrote, "Despite continuous efforts to obtain the source of these payments, including issuing a subpoena specifically requesting the same, Persolve was not able to get this information until this morning."

The letter continued: "Your client's defense has been that although he visited Dr. Deirmenjian's office, he did not have any work done. Unfortunately, Dr. Deirmenjian's office has failed to provide records on the account despite two subpoenas for the same. As such, based on all the facts it appears that there may be identity theft/fraud involved here and Persolve requests a 60 day continuance of the trial to be able to subpoena the bank account which appears to be the source of the payments on the account. I am attaching a copy of the correspondence I received from GE Money Bank this morning referencing the bank account information on file." The letter concluded: "Please contact me as soon as possible to advise if you are agreeable to a stipulation to continue the trial by 60 days to allow us to subpoena the bank account which was the source of at least the last payment on the account and shed light into the true identity of the person responsible. I will appear on Monday and ask the court for the continuance based on these recent developments without you having to appear and incur any additional costs."

The trial did not go forward on April 22, 2013. A hearing was held on that date, but no transcript is in the record. According to a minute order, the court dismissed the case without prejudice pursuant to Persolve's oral motion. McClain testified that Persolve's counsel sought a continuance at the hearing, which the court denied, so Persolve dismissed the case "as they stated in that letter," presumably referring to Persolve's April 19, 2013 letter to him.

With regard to the hearing, Persolve's attorney testified: "I don't recall the exact case, specifics of this case, but having looked at this letter, it appears that there was additional evidence that could have either proven or disproven a potential

identity theft. [¶] As an attorney with my obligations to the court, to the defendant, and to my client, I would not proceed with that case at that time knowing that there was additional documentation that could either show identity theft or the lack thereof; that Mr. McClain know [*sic*] all along or he didn't know anything about the account. [¶] So no, I don't remember the exact state of mind on this case on that date more than four years ago. But having read this letter, reading why I was asking for a continuance, I would not have pursued it. Because there was a potential that there might have been identity theft, and without the additional documents, I couldn't know for sure."

The parties stipulated that Persolve reported the underlying lawsuit to credit bureaus on October 11, 2010 and did not remove it until September 29, 2014, approximately a year and a half after the case was dismissed.

At the end of the presentation of evidence, the trial court granted Persolve's motion for a directed verdict.

DISCUSSION

I. Standards of Review

Pursuant to Code of Civil Procedure section 630, "after all parties have completed the presentation of all of their evidence in a trial by jury, any party may, without waiving his or her right to trial by jury in the event the motion is not granted, move for an order directing entry of a verdict in its favor." (Code Civ. Proc., § 630, subd. (a).)

"[A] directed verdict is in the nature of a demurrer to the evidence." (*Howard, supra,* 72 Cal.App.4th at p. 629.) "A directed verdict may be granted only when, disregarding conflicting evidence, giving the evidence of the party against whom the motion is directed all the value to which it is legally

entitled, and indulging in every legitimate inference from such evidence in favor of that party, the court nonetheless determines there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion, or a verdict in favor of that party." (*Id.* at pp. 629–630.) We review the grant of a directed verdict de novo. (*Guillory v. Hill* (2015) 233 Cal.App.4th 240, 249.)

II. The Malicious Prosecution Claim Fails Because Persolve Had Probable Cause to Pursue Its Case

"To prevail on a malicious prosecution claim, the plaintiff must show that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without probable cause; and (3) was initiated with malice." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 (*Soukup*).) Construing the evidence and drawing all inferences in McClain's favor as we must, we conclude McClain failed to establish the lack of probable cause. That element is dispositive, so we do not address the others.

When the facts known to the attorney at the time of initiating the underlying lawsuit are undisputed, probable cause is a question of law to be resolved by the court. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881; see *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817 (*Wilson*).) It is determined objectively, evaluating the reasonableness of the attorney's conduct and asking " ' "whether any reasonable attorney would have thought the claim tenable" ' " on the basis of the facts known at the time. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 971 (*Zamos*).) " 'A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable

cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.' " (*Soukup, supra,* 39 Cal.4th at p. 292.) This standard is lenient, reflecting " 'the important public policy of avoiding the chilling of novel or debatable legal claims.' " (*Wilson*, at p. 817.) Thus, a malicious prosecution claim may only arise out of "actions that ' "any reasonable attorney would agree [are] totally and completely without merit." ' " (*Ibid.*) A party might also be liable for continuing to prosecute a case after discovering probable cause is lacking. (*Zamos,* at p. 973.)

McClain does not dispute the facts known to Persolve at the time of the filing of the underlying suit. Persolve's attorney testified that when Persolve was assigned a debt, it would generally receive a spreadsheet that contained "account information, naming the person, the person's address, their social security, the amount of the debt, the last payment date, the open date." The information Persolve had on hand from GE Money Bank showed the account at issue "was opened by somebody by the name of Lorenzo Mr. McClain, there were payments on the account, the last payment date, and the account was charged off with a balance." McClain vigorously disputed that the information Persolve had was accurate, but he offered no evidence to suggest Persolve did not actually receive this information or that Persolve's attorney inaccurately described the information Persolve had on hand.

Instead, McClain argues that this information was "at least double hearsay with no foundation and would not have been admissible evidence to prove anything." The spreadsheet is not in the record, so we cannot fully evaluate his argument. In any case, the spreadsheet created by Persolve in the course of its

business at least arguably fell within the business records hearsay exception. (Evid. Code, § 1271.) Given the information Persolved received from GE Money Bank, Persolve could have reasonably believed that it could obtain information during discovery to establish a proper foundation. McClain offered no evidence that Persolve had any doubts about the accuracy of the information at the time it filed the underlying lawsuit. Having received this information in the general course of business along with the assignment of the debt, Persolve could have reasonably believed McClain owed the debt and that there was a tenable foundation for a lawsuit to collect it.

McClain contends that even if Persolve had probable cause to file the lawsuit, it lacked probable cause to pursue the case after he denied the debt and provided the documents from his bank account, dental records, and dental insurance showing nothing related to Dr. Deirmenjian or the alleged debt. He also heavily relies on Persolve's "factually devoid" discovery responses that "provided *nothing* to show that McClain owed the alleged debt." Yet, he testified that Persolve sent him account statements in December 2010. True, those statements did not bear his or anyone else's name, but they showed 35 payments on the account over the course of four years. When coupled with the information Persolve received from GE Money Bank, these statements could have cast doubt on McClain's claims that the account was not his. McClain also refused to complete the "ID Theft Statement" and affidavit Persolve sent to him, which Persolve's attorney testified would have been a "red flag" to her. Those circumstances could have prompted a reasonable attorney to question McClain's denials regarding the account and to continue to pursue the case.

Furthermore, on the eve of trial, Persolve received additional information, including that the statements were addressed to McClain at his home address. Despite that, Persolve's attorney expressed uncertainty about the debt, noting in her April 2013 letter that there *may* be an issue of identity theft. Within days, Persolve sought a continuance, and when that was not forthcoming, it dismissed the case without prejudice. Persolve apparently did not pursue the case beyond that stage, and in the end there appears to have been no clear resolution of the issues. The information in Persolve's possession that connected McClain to the account was thin, but a reasonable attorney could have relied on it to believe the claims against him were factually tenable.

McClain also takes issue with Persolve's attorney's trial testimony that the account statements without any underlying signed agreement were sufficient to prevail on the causes of action for open book account, common counts, and account stated. McClain interposed objections that her testimony expressed improper legal opinions, but the objections were overruled. McClain argues on appeal that this testimony should have been excluded and that it was legally incorrect because, in McClain's words, "[e]ach of these causes of action require proof that the *defendant*, not someone else, entered in a *contract* by applying and receiving credit."

If this testimony was erroneously admitted, McClain has not shown he suffered any conceivable prejudice. (Evid. Code, § 353, subd. (b) [erroneous admission of evidence not reversible error unless it results in "miscarriage of justice"].) He is correct opinion testimony on a legal issue is inadmissible. (See *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178.) Expert

legal opinions are generally excluded because there is a risk the jury would follow the witness's testimony and not the court's instructions. (See *id.* at p. 1185 [attorney witness's legal opinions were "inadmissible because they usurped the responsibility of the court to instruct the jury on the applicable law"].) The issues never went to the jury here, so that risk did not exist.

Moreover, nothing in the record suggests the trial court improperly accepted this testimony as accurate without independently deciding the legal requirements for the causes of action alleged. We presume the trial court acted properly and McClain has the burden to demonstrate error based on the record that would justify reversal of the judgment. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 609.)

Persolve's attorney's testimony was also arguably accurate—the statements in Persolve's possession could have been sufficient to prove the causes of action alleged without having the actual underlying agreement. " 'A common count is not a specific cause of action . . . ; rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness. . . .' " (*Professional Collection Consultants v. Lujan* (2018) 23 Cal.App.5th 685, 690 (*Lujan*).) Open book account and account stated are two common counts.

" 'A "book account" is "a detailed statement which constitutes the principle record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith . . . ." ' [Citation.] The creditor must keep these records in the regular course of its business and 'in reasonably permanent form,' such as a book or card file. [Citation.] 'A book account is "open" where a balance remains due on the account.' "

(*Lujan, supra,* 23 Cal.App.5th at pp. 690–691.) " 'An express contract, which defines the duties and liabilities of the parties, whether it be oral or written, is not, as a rule, an open account.' [Citation.] However, the parties may agree to treat money due under an express contract, such as a lease, as items under an open book account. [Citation.] '[I]n such a case, the cause of action is upon the account, not under the [express contract].' " (*Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 969 (*Lauron*).)

" 'An account stated is "an agreement, based on prior transactions between the parties, that the items of an account are true and that the balance struck is due and owing." ' [Citation.] 'When an account stated is " 'assented to, either expressly or impliedly, it becomes a new contract.' " . . . Accordingly, an action on an account stated is not based on the parties' original transactions, but on the new contract under which the parties have agreed to the balance due.' " (*Lujan, supra,* 23 Cal.App.5th at p. 691.) " '[A]n element essential to render the account stated is that it receive the assent of both parties, but the assent of the party sought to be charged may be implied from his conduct.' [Citation.] For example, '[w]hen a statement is rendered to a debtor and no reply is made in a reasonable time, the law implies an agreement that the account is correct as rendered.' " (*Lauron, supra,* 8 Cal.App.5th at p. 968.)

We need not decide whether Persolve could *actually* satisfy these standards with the statements in its possession without the underlying agreement. These formulations demonstrate that the statements plausibly *could have been* sufficient. Hence, Persolve's attorney's testimony was not inaccurate and could have had no prejudicial impact on McClain's case.

Again, the probable cause standard is lenient, and the only question is whether Persolve relied on " 'facts which [it] has no reasonable cause to believe to be true,' " or if it sought recovery " 'upon a legal theory which is untenable under the facts known to [it].' " (*Soukup, supra,* 39 Cal.4th at p. 292.) McClain has not met that standard here. The directed verdict in Persolve's favor on the malicious prosecution claim was therefore proper.

III. Defamation of Credit

McClain's remaining cause of action was for defamation of credit. McClain concedes that, as a common law claim, this cause of action is preempted by the federal Fair Credit Reporting Act. (15 U.S.C., § 1681t, subd. (b)(1)(F); *Sanai v. Saltz* (2009) 170 Cal.App.4th 746, 773–774 (*Sanai*); see also *Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545, 567–569 [following *Sanai* and finding negligent credit defamation claim preempted].)

McClain argues the claim is actually for a violation of Civil Code section 1785.25, subdivision (a), which is not preempted. (*Sanai, supra,* 170 Cal.App.4th at pp. 774–778.) Persolve points out that McClain did not cite this statute at any point in the trial court. McClain does not contend otherwise; he simply argues in a footnote in his reply brief that his first amended complaint was "not specific" and he "expressly stated" the claim was "based on statutes" in his opposition to the directed verdict motion and at oral argument. We have reviewed the portions of the record he cites. He did not mention section 1785.25 or anything that could arguably refer to this provision. We find his argument forfeited. (*Lauron, supra,* 8 Cal.App.5th at p. 972 [arguments raised for first time on appeal are generally deemed forfeited].)

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

BIGELOW, P. J.

We concur:

GRIMES, J.

RUBIN, J. *

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* Presiding Justice of the Court of Appeal, Second Appellate District, Division Five, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.